

A **TETUAN WY CHAN & ROY v. MODULAR TECHCORP
HOLDINGS BHD & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR

HARMINDAR SINGH DHALIWAL J

[ORIGINATING SUMMONS NO: 24NCC-461-12-2014]

B 9 JUNE 2015

CIVIL PROCEDURE: *Interpleader summons – Nature of interpleader proceedings – Duty of stakeholder – Competing claims between parties pursuant to share sale agreement – Whether action for specific performance had been previously struck out for want of prosecution and inordinate delay – Whether interpleader proceeding could be turned into claim for breach of contract – Whether claimant allowed to re-open matters which had been decided in previous suit – Whether stakeholder bound by terms of agreement – Rules of Court 2012, O. 17*

D In 2005, the first claimant entered into a share sale agreement ('SSA') to purchase 840,000 shares in a company for RM21,500,000 from the second claimants and a sum of RM2,150,000 was paid as deposit. However, the Securities Commission ('SC') via a letter informed the first claimant's advisors for the said acquisition that the completion of the proposed transaction should be withheld pending the SC's investigation and review of the SSA. In February 2006, the first claimant made a general announcement that it was unable to proceed with the proposed acquisition of the shares since the SC's review was still ongoing. On 25 April 2006, *vide* an originating summons ('OS') filed in the High Court, the second claimants commenced an action against the first claimant and sought, *inter alia*, specific performance of the SSA. The High Court ruled in favour of the second claimants and this decision was appealed against by the first claimant. The Court of Appeal, however, allowed the appeal and ruled that (i) the matter be remitted back to the High Court for trial before a different judge; (ii) the OS was to be continued and converted into a writ action; and (iii) the second claimants had to file and serve a copy of their statement of claim within 14 days from the order of the Court of Appeal. Due to the inordinate delay and failure to comply with the Court of Appeal's order, the first claimant filed an application to strike out the OS suit for want of prosecution and this application was granted by the High Court on 15 May 2014. The second claimants appealed against the decision of the High Court in striking out their suit but the Court of Appeal dismissed the said appeal. In reply to the first claimant's solicitors' demand for the return of the deposit, the applicant, a firm of advocates and solicitors who acted as stakeholders in the transaction, informed that out of the original deposit sum of RM2.15 million, the sum of RM1,075,000 had been released on 14 September 2005 in accordance with the SSA. As such, the applicant was holding the balance deposit sum of RM1,075,000 together with interest. By virtue of O. 17 of the Rules of Court 2012, the applicant sought the exercise of the court's jurisdiction to

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grant interpleader relief to the respective claimants' competing claims. The first claimant argued that it had duly rescinded the SSA and the action for specific performance of the SSA was in existence from 25 April 2006 to 15 May 2014 until it was struck off by the High Court for want of prosecution/inordinate delay. It was further contended that the applicant was obliged to return the deposit with interest to the first claimant as a natural consequence of the events that took place and the fact that the second claimants were precluded by the provisions of the Limitation Act 1953 from mounting any new action to proceed with the SSA. On the other hand, the second claimants argued that the SC's approval was not a precondition stipulated in the SSA and they were ready, able and willing to proceed with the SSA. Further, it was submitted that a party could not affirm and disaffirm a transaction.

Held (ordering release of RM1,075,000 to first claimant):

- (1) It was the duty of the claimants to put forward their claims so that the court can decide who is entitled to the relief sought by the interpleader. On the facts, the interpleader proceeding could not be turned into a claim for breach of contract between the second claimants against the first claimant. It was not the function of the court to try the matter as if it was an action in tort or contract between the claimants. (paras 13 & 16)
- (2) The contention that the second claimants were ready, able and willing to comply with the SSA was totally irrelevant as their action for specific performance had been struck out for want of prosecution and inordinate delay. They had no more rights to claim for specific performance of the agreement as the issue had been decided by the courts. (para 14)
- (3) Any claim for breach of the SSA and forfeiture of the deposit would have been first available to the second claimants sometime in the year 2006. The relevant events leading to the impasse between the parties took place in 2006. As such, any action for breach of the SSA and the subsequent forfeiture of the deposit was time-barred by s. 6 of the Limitation Act 1953. This would be sufficient to defeat any claim by the second claimants. (para 17)
- (4) The question of affirmation of a contract may arise if the party who has the right to rescind a contract elects, with knowledge of his legal rights as well as all the facts giving him that right, affirms the contract. In such a case, his election is final in that he cannot subsequently change his mind and rescind the contract instead. However, no such issues arose in this case and the principle of estoppel which follows from such contentions had no application to the facts and circumstances in this action. (para 19)

- A (5) The second claimants were not allowed re-open matters, such as whether the agreement could be rescinded or that the SC's letter was an impediment to the SSA as that would be akin to re-opening the matter by the side door. Such matters were not appropriate for an interpleader hearing. As such, the first claimant's criticism that the second claimants were trying to get the proverbial second bite of the cherry by putting forward a time-barred claim in an interpleader hearing was not misplaced. (para 20)
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- C (6) A stakeholder's duty is to hold the money he had received *in medio* pending the outcome of a future event. He holds such money as a trustee for both parties and can only dispose of such money in accordance with the terms in which it was held. On the facts, the terms of the stakeholder's arrangement were set out in the SSA which stipulated, among others, that if any of the conditions were not fulfilled within the approved period, the stakeholder was to return the moneys held by them to the purchaser, *ie*, the first claimant. It follows that unless the second claimants succeeds in establishing a case for forfeiture of the deposit, which they had not, the money were to be returned to the first claimant. The money could not be retained by the stakeholders or forfeited by them on account of limitation as they held such money on trust. (paras 22-24)
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Case(s) referred to:

- Burt v. Claude Cousins & Co* [1971] 2 QB 426 (*refd*)
De La Rue v. Hernu, Peron & Stockwell, Ltd, De La Rue, Claimant [1936] 2 All ER 411 (*refd*)
Maloney v. Hardy [1970] 216 EG 1582 (*refd*)
- F *Peninsular Concord Sdn Bhd v. Datuk M Kayveas & Anor* [2011] 7 CLJ 978 HC (*refd*)
Sorrell v. Finch [1977] AC 728 (*refd*)
Suisse Atlantique Societed' Armement Maritime SA v. NV Rotterdamsche Kolen Centrale [1966] 2 All ER 61 (*refd*)
Tetuan Teh Kim Teh, Salina & Co v. Tan Kau Tiah & Anor [2013] 5 CLJ 161 FC (*refd*)
Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram [2001] 3 CLJ 743 HC (*refd*)
- G *Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd* [1987] 2 CLJ 26; [1987] CLJ (Rep) 400 SC (*refd*)

Legislation referred to:

- Limitation Act 1953, s. 6
- H Rules of Court 2012, O. 17

For the applicant - Wong Swee Yee; M/s WY Chan & Roy
For the 1st claimant - Ramesh Gopal; M/s Rajes Hisham Rahim & Gopal
For the 2nd claimants - Jeffery Wong; M/s Jeffery Wong, Noorul, Ho & Lim

- I *Reported by Kumitha Abd Majid*

JUDGMENT

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Harmindar Singh Dhaliwal J:**Introduction**

[1] By this originating summons ('OS') the applicant is seeking the exercise of the court's jurisdiction under O. 17 of the Rules of Court 2012 ('RC 2012') to grant interpleader relief to the competing claims by the claimants. The applicant, a firm of advocates and solicitors, was holding a balance deposit sum of RM1,075,000 (together with interest) as stakeholders under an agreement for the sale of shares.

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[2] The first claimant (Modular Techcorp Holdings Bhd) had agreed to purchase shares in Blue-1 Network Sdn Bhd from the second claimants (Alex Sashitharan a/l Rajadurai & Ng Boon Chong). For reasons that will become apparent shortly, the agreement was aborted by the first claimant leaving the said balance deposit with the applicant stakeholders. The court has to now decide in this interpleader proceeding which of the two claimants are entitled to the said sum.

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Background Facts

[3] The claimants and the proceedings between them have a chequered history. Without going through each and every correspondence and exhibit, the chronology of events leading to the current proceeding can be adequately summarised as follows:

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7 September 2005 - The Share Sale Agreement ("SSA") was signed by First Claimant ["Modular Tech"] to purchase 840,000 shares (70% interest) in Blue-I Network Sdn Bhd for RM21,500,000.00 from Second Claimants [Alex Sashitharan and Ng Boon Choon] ("Alex & Ng"), pursuant to which First Claimant [Modular Tech] had paid a deposit of RM2,150,000.00.

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25 November 2005 - The Securities Commission ("SC") *via* a letter informed Malaysia International Merchant Bankers ("MIMB") being First Claimant's [Modular Tech] advisors for the said acquisition, that the completion of the proposed transaction should be withheld pending the SC's investigation and review of the SSA.

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20 December 2005 - Messrs Salina Lim Kim Chuan & Co (the solicitors acting for First Claimant [Modular Tech] at the time) wrote to the Applicant (Messrs W.Y. Chan & Roy) *inter-alia* about the issue with the SC.

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| A | 5 January 2006 | - The Applicant replied stating <i>inter-alia</i> that their clients refute the allegation that the SC's approval is a necessary condition precedent under the SSA. |
| B | 21 February 2006 | - Messrs Amir, Yap & Co (acting for Second Claimants [Alex and Ng] at the time) wrote to Messrs Salina, Lim Kim Chuan & Co <i>inter-alia</i> disagreeing that the SSA was subject to the SC's approval. |
| C | 27 February 2006 | - Messrs Salina, Lim Kim Chuan & Co wrote to Messrs Amir, Yap & Co and informed them that as the approval period under the SSA had expired with certain clauses being unfulfilled and due to the uncertainty of the timing of the review by the SC, the SSA was rescinded and had requested that their clients refund the deposit together with all accrued interest thereon. |
| D | 28 February 2006 | - First Claimant [Modular Tech] also made a General Announcement that <i>inter-alia</i> as the SC's review was still on going, Modular Tech's Board of Directors were of the view that First Claimant [Modular Tech] was unable to proceed with the proposed acquisition of the said shares. |
| E | 25 April 2006 | - Second Claimants [Alex & Ng] <i>via</i> an Originating Summons ("OS") in the High Court (D4-24-140-2006) commenced an action against Modular Tech, seeking <i>inter-alia</i> for a declaration that the SC's letter of 25.11.2005 was not an impediment to the SSA and also seeking specific performance of the SSA. |
| F | 9 January 2008 | - The High Court ruled in favour of Second Claimants [Alex & Ng]. This decision was appealed by First Claimant [Modular Tech] <i>via</i> Civil Appeal No. W-02-141-2008 to the Court of Appeal. |
| G | 9 October 2008 | - The High Court gave further consequential orders in favour of Second Claimants [Alex and Ng] to regulate the specific performance of the SSA. This was also appealed against by First Claimant [Modular Tech] <i>via</i> Civil Appeal No: W-02-1274-2008 to the Court of Appeal. |
| H | 7 January 2011 | - The Court of Appeal (<i>via</i> Civil Appeals No: W-02-141-2008 & W-02-1274-2008) unanimously allowed both appeals of First Claimant [Modular Tech] and <i>inter-alia</i> made the following orders: |
| I | | - The High Court Orders of 9.1.2008 & 9.10.2008 were set aside and the matter was remitted back to the High Court for trial before a different judge. |

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| | - The OS dated 25.4.2006 is to be continued and converted into a Writ Action. | A |
| | - The Second Claimants [Plaintiffs Alex & Ng] were to file and serve a copy of their Statement of Claim within 14 days of the order of the Court of Appeal. | B |
| 12 July 2013 | - First Claimant [Modular Tech] filed a Notice of Application to strike out the OS suit (by Second Claimants [Alex & Ng]) in the High Court for want of prosecution due to inordinate delay and failure to comply with the order of 7.1.2011 of the Court of Appeal. | C |
| 15 May 2014 | - The High Court granted the application by First Claimant [Modular Tech] and duly struck out the suit (OS No. D4-24-140-2006) with costs to First Claimant [Modular Tech]. Second Claimants [Alex & Ng] appealed against this decision to the Court of Appeal <i>via</i> Civil Appeal No. W-02(IM)-1090-06/2014 | D |
| 30 September 2014 | - The Court of Appeal (<i>via</i> Civil Appeal No: W-02(IM)-1090-06/2014) dismissed the said appeal by Second Claimants [Alex & Ng]) against the striking out of their suit (OS No: D4-24-140-2006) by the High Court with costs to First Claimant [Modular Tech]. | E |
| 31 October 2014 | - The First Claimant's solicitors wrote to the Applicant (M/s. W.Y. Chan & Roy) informing them that the Second Claimants' suit had been struck off for want of prosecution and demanded for the return of the deposit under the SSA. | F |
| 17 November 2014 | - The Applicant replied to First Claimant's solicitors stating that out of the original deposit sum of RM2.15 Million, under the SSA, they were still in possession of RM1,075,000.00 together with interest as the rest of the deposit (of RM1,075,000.00) had been released on 14.9.2005 in accordance with the SSA. | G |
| 28 November 2014 | - The Applicant wrote to the First Claimant's solicitors stating that they would be placing the said sum of RM1,075,000.00 together with interest into a fixed deposit account due to the Second Claimants' solicitors letter of 24.11.2014 which: | H |
| | - claimed that the Second Claimants are ready, willing and able to go through with the SSA. | I |
| | - stated that the deposit should be forfeited under Clause 12.2 SSA. | |

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[6] It was submitted that any purported further legal action(s) by the second claimants in relation to the rescission of the SSA by the first claimant or any other action proposed action of the second claimants is now clearly time-barred by the provisions of the Limitation Act 1953.

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[7] It was further contended that by cl. 3.3.1(iii) of the SSA, the applicant as stakeholders are obliged to return the deposit with interest thereon to the first claimant – as a natural consequence of the above sequence of events, as the second claimants are now precluded by the provisions of Limitation Act 1953 from mounting any new action against the first claimant to proceed with the SSA, or from purporting only now to rescind the SSA and attempting to forfeit the deposit at this juncture.

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The Second Claimants' Arguments

[8] The second claimants contended that in the absence of any court orders directing how the deposit currently held by the applicant is to be dealt with, the best way to resolve this impasse is to refer to the terms in the Sale of Shares Agreement (SSA), that is cl. 12.2, something which the parties have agreed upon at the beginning of the transaction.

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[9] Here the first claimant (the purchaser) did not pay the balance sum (as defined in the SSA). They claimed that they could not proceed with the SSA due to a review by the SC. However, the second claimants argued that the approval of the SC is not a pre-condition stipulated in the SSA. What is even more surprising is that to-date after almost ten years, there is still no result from the so-called review of the SC relied on by the first claimant to rescind the SSA.

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[10] The second claimants, on the other hand, have always maintained that they were ready, able and willing to proceed with the SSA. The original action which was struck off by the order of the Court of Appeal on 30 September 2014 sought for the remedy of specific performance. The second claimants did not seek for an order that the SSA be terminated and that the deposit (being the subject matter of the current interpleader summons) be forfeited because they wanted to proceed with the SSA.

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[11] The second claimants, it was contended, could not have taken an inconsistent stand at the time when the original action was filed by seeking inconsistent remedies. To seek for an order that SSA be terminated and for the deposit to be forfeited would be inconsistent with the remedy of specific performance. Relying on the cases of *Suisse Atlantique Societe d'Armement Maritime SA v. NV Rotterdamsche Kolen Centrale* [1966] 2 All ER 61 and *Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram* [2001] 3 CLJ 743, they submitted that a party cannot affirm and disaffirm a transaction.

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A **Decision**

[12] The duty of the court in an interpleader proceeding is without controversy. The provisions relating to such proceedings are well set out in O. 17 of the RC 2012. The Federal Court in *Tetuan Teh Kim Teh, Salina & Co v. Tan Kau Tiah & Anor* [2013] 5 CLJ 161 followed the lucid explanation of an interpleader proceeding in the old English case of *De La Rue v. Hernu, Peron & Stockwell, Ltd, De La Rue, Claimant* [1936] 2 All ER 411 where Greene LJ in a separate judgment observed as follows:

C What, in substance, all along, both under the old equitable procedure and under the modern procedure, is being decided, is claims by two claimants against the person interpleading. What really happens is that whereas there are two claimants who are harassing a person desirous of interpleading, that person is interpleading by the inter-pleader proceedings calling upon the claimants to come out into the open and formulate their claims against him.

D In substance, when an inter-pleader issue is tried, two actions against the person interpleading are being dealt with, and interpleader proceedings is the method of compelling the parties-either one, or both, or neither of whom may have actually issued a writ-to prosecute their claims. As it is the essence of interpleader proceedings that the person who has interpleaded has no title himself. He naturally drops out of the suit. But in effect the entire matter is tried out in the presence of all the parties concerned, and the real claimants are compelled to put forwards their claims and have them adjudicated upon. The reason for that is not for their own benefit. It is for the relief of the person interpleading.

F When it is once appreciated that is the true nature and history of inter-pleader proceedings, I take the view that it is quite wrong to treat an issue directed under the interpleader rules as though it were an action of tort. It is a method to enable the court to decide the claims between two persons present at the proceedings, and to decide those claims so that the person interpleading will get the relief to which he is entitled.

G [13] With these observations in mind, it was really the duty of the claimants to put forward their claims so that the court can decide who is entitled to the relief sought by the interpleader. It was not the function of the court to try the matter as if it was action in tort or contract between the claimants.

H [14] Coming now to the present proceedings, I agree that the second claimants' contention that they are "ready, able and willing to comply with the SSA" is totally irrelevant in these proceedings as their action for specific performance has been struck out for want of prosecution and inordinate delay. It must follow that the second claimants have no more right to claim for specific performance of the agreement as the issue has been decided by the courts.

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[15] On the question of forfeiture of the deposit, the second claimants are relying on cl. 12.2 of the SSA which states: A

12.2 Default by the Purchaser

In the event that the Conditions are fulfilled and the Purchaser shall fail to pay the Balance Sum in the manner provided herein, the Vendor shall be entitled to forfeit the Deposit and the Purchaser shall be entitled to the refund of all monies paid to account of the Consideration (including all interest accrued thereon) other than the Deposit. Subject to the aforesaid, the Parties hereto shall have no further claim against the other. B

[16] In this regard, I think there are two difficulties with the second claimants' assertions. The first is that it cannot have been the case that the conditions of the SSA have been fulfilled as the agreement became unravelled once SC decided to review it. So, to now claim entitlement to the forfeiture of the deposit under cl. 12.2 is rather rich and stretching the facts. In any event, as alluded to earlier, the interpleader proceeding cannot be now turned into a claim for breach of contract between the second claimants against the first claimant. C D

[17] The second problem, more importantly, is that any such claim for breach of the SSA and now forfeiture of the deposit would have been first available to the second claimants sometime in the year 2006. The relevant events leading to the impasse between the parties all took place in 2006. It would therefore appear that any action for breach of the SSA and subsequent forfeiture of the deposit is now time-barred by s. 6 of the Limitation Act 1953. This would be sufficient to defeat any claim by the second claimants. E

[18] Nevertheless, there also appears to have been some confusion on the part of the first claimant when they refer to the facts and contend that the second claimants "cannot approbate and reprobate" and also on the part of the second claimants when they similarly argue that a party cannot adopt inconsistent stands in affirming or disaffirming a transaction. In this regard, I am not aware of any principle of law which prohibits pleading alternative relief. The second claimants could very well have pleaded for specific performance or in the alternative, if the court refuses specific performance, a claim for damages for breach of agreement. In the same way, there is no question of approbation or reprobation as alleged by the first claimant as the question of election does not arise from the facts. F G H

[19] The question of affirmation of a contract may arise, however, if the party who has a right to rescind a contract elects, with knowledge of his legal rights as well as all the facts giving him that right, affirms the contract. In such a case, his election is final in that he cannot subsequently change his mind and rescind the contract instead (see *Goff & Jones, Law of Restitution*, 6th edn., at para. 9-032). No such issues however arise in this case and the principle of estoppel which follows from such contentions has no application to the facts and circumstances in this action. I

- A [20] The only question of concern is whether the second claimants can re-open matters, such as whether the agreement can be rescinded or that the SC's letter was an impediment to the SSA, which would have been in issue in the original High Court action had that action not been struck out. I agree that they ought not to be allowed to do so as that would be akin to re-opening
- B matters by the side door. As mentioned earlier such matters are not appropriate for an interpleader hearing. As such, the first claimant's criticism of the second claimants trying to get the proverbial second bite of the cherry by putting forward a time-barred claim in an interpleader hearing, in my opinion, is not misplaced.
- C [21] One other confusion that arises is the contention by the second claimants that if their claim for the deposit is time-barred, the claim by the first claimant in respect of the same deposit would be time-barred as well. I think this argument overlooks the important fact that the deposit is now with the stakeholder applicant. This calls for an inquiry as to the duty of the
- D stakeholder.
- E [22] The duty of a stakeholder in law is now firmly settled. A stakeholder's duty is to hold money he has received *in medio* pending the outcome of a future event. He holds such money as a trustee for both parties and can only dispose of such money in accordance with the terms in which it is held (*Maloney v. Hardy* [1970] 216 EG 1582; *Burt v. Claude Cousins & Co* [1971] 2 QB 426; *Sorrell v. Finch* [1977] AC 728; *Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd* [1987] 2 CLJ 26; [1987] CLJ (Rep) 400; [1988] 1 MLJ 116; *Peninsular Concord Sdn Bhd v. Datuk M Kayveas & Anor* [2011] 7 CLJ 978; [2011] 2 MLJ 534).
- F [23] Now the terms of the stakeholder arrangement were set out in cl. 3.3 of the SSA of which the relevant cl. 3.3.1(iii) reads:
- G If any of the Conditions (to the extent not waived by the purchaser) is not fulfilled by the last day of the Approval Period as confirmed by the Purchaser's Solicitors, within three (3) Business Days of the receipt by the Vendor's Solicitors of the Purchaser's Solicitors confirmation of the expiry of the Approval Period, all moneys paid to the account of the Deposit which are held by the Vendor's solicitors as stakeholder shall be returned to the Purchaser together with interest accrued thereon and the Vendor shall refund the Initial Sum free of interest to the Purchaser whereupon this Agreement shall lapse and neither party shall have any claim
- H whatsoever against the other.
- I [24] What this means in a nutshell is that if any of the conditions are not fulfilled within the approved period, the stakeholder is to return the moneys held by them to the purchaser (first claimant). It follows that unless the second claimants succeed in establishing a case for forfeiture of the deposit, which they have not, the moneys are to be returned to the first claimant. The money cannot be retained by the stakeholders or forfeited by them on account of limitation as they hold such moneys on trust. The contention by the second claimants in this regard is therefore misconceived in law.

Conclusion And Order

[25] In the circumstances, and for the reasons stated, it is ordered that the balance of the deposit monies of RM1,075,000 together with all interest thereon currently being held by the applicant as stakeholder, after deduction of any stakeholder fees or expenses, are to be released forthwith by the applicant to the first claimant. The second claimants are to pay costs fixed at RM8,000 to the first claimant.

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